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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j) of the)	
Communications Act —)	MM Docket No. 97-234
Competitive Bidding for Commercial)	
Broadcast and Instructional Television)	
Fixed Service Licenses)	
)	
Reexamination of the Policy Statement)	GC Docket No. 92-52
on Comparative Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	
Comparative Hearing Process to Expedite)	GEN Docket No. 90-264
the Resolution of Cases)	

COMMENTS

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EXECUTIVE SUMMARY

The Wireless Cable Association International, Inc. ("WCA"), the principal trade association of the wireless cable industry, submits that the Commission is not required to employ competitive bidding to select from among mutually-exclusive applications for new Instructional Television Fixed Service ("ITFS") stations, and that the public interest would not be served were the Commission to voluntarily shift to competitive bidding for resolving such mutually exclusive applications.

While the *Notice* in this proceeding suggests that, because Congress did not specifically exempt ITFS from competitive bidding, the Commission may be obligated to resolve mutually exclusive applications for new ITFS licenses through auction, WCA respectfully disagrees -- WCA believes that Congress intended for ITFS stations to fall within the description of "noncommercial educational broadcast stations" that are exempt from auction authority. Moreover, the use of auctions is inappropriate for selecting the "best" ITFS licensee from among competing applicants, since the willingness to pay more for a license is unrelated to the Commission's time-tested ITFS comparative criteria. The values reflected by those criteria -- a preference for local, accredited schools that will utilize the proposed facility extensively for the transmission of educational programming -- are not necessarily achieved when licenses are sold to the high bidder. The use of auctions is particularly inappropriate with respect to currently pending applications (which have been on file since at least October 1995), since applicants have reasonably relied on the readily-predictable outcome of comparative proceedings under the current point system. As such, the Commission should refrain from subjecting ITFS applications to auction.

However, should the Commission disagree, WCA urges the Commission to carefully craft competitive bidding procedures for ITFS that accommodate the specific objectives of the ITFS spectrum reservation and the special needs of ITFS eligibles. In the event that competitive bidding is imposed on ITFS, the Commission should take pains to preserve the objectives that its current ITFS rules are designed to achieve and to minimize regulatory delay in the licensing of ITFS facilities. These objectives can only be preserved through retention of engineering-based determinations of mutual exclusivity to minimize the number of auctions that must be held, the use of open outcry auctions that reflect the inelasticity of demand for ITFS licenses in different markets, the use of filing windows to control the filing of applications for new ITFS stations and avoid mutual-exclusivity with modification applications, and the use of bidding credits to achieve to some degree the objectives of the current comparative selection point system.

And, perhaps most importantly, because of the competitive pressures facing the wireless cable industry, the Commission must resolve the issues associated with the use of competitive bidding to select from among mutually-exclusive ITFS applications quickly so that long-pending ITFS applications can be processed -- even if that means bifurcating this proceeding so that the Commission addresses ITFS issues before resolving the more controversial issues associated with the use of auctions in the commercial broadcast services.

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COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submits its comments in response to the *Notice of Proposed Rulemaking* ("Notice") in this proceeding.^{1/}

^{1/} See *Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264, FCC 97-397 (rel. Nov. 26, 1997)[hereinafter cited as "Notice"]. By an *Errata* released on December 11, 1997, the Commission established a deadline of January 26, 1998 for the submission of comments in this proceeding. See *Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, MM Docket 97-234, GC Docket No. 92-52, Gen. Docket No. 90-264 (rel. Dec. 11, 1997)[hereinafter cited as "Errata"].

I. INTRODUCTION.

As the principal trade association of the wireless cable industry, WCA has a keen interest in the outcome of this proceeding. With the *Notice*, the Commission has solicited public comment on, *inter alia*, whether the Commission is required to employ competitive bidding to resolve mutually exclusive applications for new Instructional Television Fixed Service ("ITFS") stations, whether auctions should be employed if not required, and what competitive bidding procedures should be employed if auctions are utilized to select from among mutually exclusive applications for new ITFS stations. WCA's membership includes not only most wireless cable operators in the United States, but also the licensees of many of the ITFS stations that lease transmission capacity to wireless cable operators for the distribution of multichannel video programming and other communications services. Obviously, any change in the procedure for licensing ITFS will have a direct impact upon both the ITFS community and the wireless cable operators that rely upon ITFS excess capacity for the transmission capacity they need to provide competitive service offerings.

For the reasons set forth below, WCA submits that the Commission is not required to employ competitive bidding to select from among mutually-exclusive applications for new ITFS stations, and that the public interest would not be served were the Commission to voluntarily shift to competitive bidding for resolving mutually-exclusive applications for new ITFS stations. However, should the Commission disagree, WCA urges the Commission to carefully craft competitive bidding procedures for ITFS that accommodate the specific objectives of the ITFS spectrum reservation and the special needs of ITFS eligibles. And, perhaps most importantly,

because of the competitive pressures facing the wireless cable industry, the Commission must resolve the issues associated with the use of competitive bidding to select from among mutually-exclusive ITFS applications quickly so that long-pending ITFS applications can be processed – even if that means bifurcating this proceeding so that the Commission addresses ITFS issues before resolving the more controversial issues associated with the use of auctions in the commercial broadcast services.

II. DISCUSSION.

A. The Commission Can And Should Maintain Its Existing Point System For Resolving Mutually-Exclusive Applications For New ITFS Stations.

In passing the Balanced Budget Act of 1997 (the “Balanced Budget Act”), Congress amended Section 309(j) the Communications Act of 1934 (the “1934 Act”) to expand the Commission’s competitive bidding authority to include mutually exclusive applications for initial licenses or construction permits in a variety of radio services that had not previously been subjected to competitive bidding procedures.^{2/} However, the Commission was not granted authority to employ auctions in the licensing of all radio services, as Congress specifically exempted certain classes of services.^{3/} Among those exempted from competitive bidding under the 1934 Act, as amended by the Balanced Budget Act, are “non-commercial educational broadcast stations” and “public broadcast stations.”^{4/}

^{2/} See Pub. L. No. 105-33, 111 Stat. 251 (1997)[hereinafter cited as “Balanced Budget Act”].

^{3/} See *id.* at § 3002(a)(2).

^{4/} See 47 U.S.C. §§ 309(j), 367(6).

The *Notice* suggests that, because Congress did not specifically exempt ITFS from competitive bidding, the Commission may be obligated to resolve mutually exclusive applications for new ITFS licenses through auction.^{5/} WCA respectfully disagrees – WCA believes that Congress intended for ITFS stations to fall within the description of “noncommercial educational broadcast stations” that are exempt from auction authority.

Although the *Notice* correctly observes that ITFS is considered by the Commission to be a “non-broadcast service” for certain purposes, that does not necessarily mean that Congress did not intend for ITFS stations to fall within the scope of the exemption for “non-commercial educational broadcast stations”. For example, in awarding tax certificates pursuant to Section 1071 of the Internal Revenue Code,^{6/} the Commission has interpreted the term “radio broadcast stations” broadly to include not only radio and television broadcast stations, but also to television networks,^{7/} cable television systems^{8/} and even nonwireline cellular partnership interests that are clearly not “broadcast stations” in the technical sense of the phrase.^{9/} In other words, rather than

^{5/} See *Notice*, at ¶¶ 98, 100.

^{6/} That statute provided that “[i]f the sale or exchange of property (including stock in a corporation) is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership or control of radio broadcast stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property within the meaning of Section 1033. ...” 26 U.S.C. § 1071, *repealed* Pub.L. 104-7, 109 Stat. 93 (1995).

^{7/} See *Mt. Mansfield Television, Inc. v. FCC*, 442 F. ed 470 (2d Cir. 1971).

^{8/} See *Cosmos Cablevision Corp.*, 33 F.C.C.2d 293, 295 (1972); *Viacom, Inc.*, 38 F.C.C.2d 541, 541 (1972).

^{9/} See *Telocator Network of America*, 58 R.R.2d 1443, 1445 (1985).

limit the phrase “broadcast stations” to its narrow technical meaning, the Commission afforded the phrase a more expansive reading in order to meet Congressional intent. The Commission should take a similar approach here.

Indeed, the facts here cry out for the Commission to interpret the exemption provisions of Section 309(j) broadly to include ITFS. Section 309(j) was initially added to the Communications Act by the Omnibus Budget Reconciliation Act of 1993 (the “1993 Budget Act”). The Conference Report to the 1993 Budget Act specifically recognized ITFS as a unique service that should be exempt from auctions because “the principal use of licenses in the Instructional Television Fixed Service is the provision of educational television programming services to public school systems, parochial schools and other educational institutions.”^{10/} Accordingly, the Commission specifically excluded ITFS from those services subject to auction when it implemented the 1993 Budget Act.^{11/}

There is absolutely no evidence in the Balanced Budget Act or in its legislative history that Congress intended to reverse course and subject mutually-exclusive applications for new ITFS stations to competitive bidding. To the contrary, it appears that while the Commission treats ITFS as a non-broadcast service for several purposes, Congress here equated ITFS with the non-commercial educational broadcast stations entitled to exemption. Indeed, when it comes

^{10/} See H.R. Rep. No. 213, 103rd Cong., 1st Sess. (1993)(Conference Report) at 481 - 82 (congressional intent to exclude ITFS from competitive bidding process).

^{11/} See *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, 9 FCC Rcd 2348, 1352 (1994) [hereinafter cited as “*Competitive Bidding Second Report and Order*”].

to the making of payments to the Federal Government in connection with the securing and holding of Commission authorizations, Congress has consistently treated non-commercial broadcasters and ITFS licensees the same. For example, when Congress first imposed application fees on Commission applicants, applicants for both non-commercial broadcast and ITFS facilities were exempt.^{12/} Subsequently, when Congress amended the 1934 Act to require the payment of annual regulatory fees by licensees of various services, neither non-commercial broadcasters nor ITFS licensees were included.^{13/} As the Commission properly concluded in explaining Congress' approach: "ITFS was excluded because of its general educational noncommercial status."^{14/}

For the Commission to find that Congress considered ITFS to be a broadcast service for purposes of competitive bidding would not be a stretch, since the Commission itself has on

^{12/} See *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Reconciliation Act of 1985*, 3 FCC Rcd 5987, 5989 (1988).

^{13/} The Commission's handling of the payment of regulatory fees by non-commercial radio licensees is illustrative of appropriate Commission interpretation of Congressional directives. Although the regulatory fee legislation clearly distinguished between commercial and non-commercial television stations, no similar distinction was made regarding AM and FM radio stations. Nonetheless, the Commission reasoned that Congress intended for all non-commercial stations to be exempt from regulatory fees. *Implementation of Section 9 of the Communications Act – Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 9 FCC Rcd 6957, 6966 (1994)[hereinafter cited as "*Regulatory Fees NPRM*"]; *Implementation of Section 9 of the Communications Act – Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 9 FCC Rcd 5333, 5341 (1994)[hereinafter cited as "*Regulatory Fees Order*"].

^{14/} *Implementation of Section 9 of the Communications Act – Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 9 FCC Rcd 5333, 5395 n.2 (1994).

occasion referred to ITFS as a broadcast service.^{15/} For example, in last month's *Fourth Order on Reconsideration in CC Docket No. 96-45 and Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213 and 95-72*, the Commission specifically stated that "the public interest would not be served if we were to exercise our permissible authority to require *broadcasters, including ITFS licensees, . . . to contribute to universal service.*"^{16/} Along similar lines, in its October 10, 1997 *Notice of Proposed Rulemaking* in MM Docket No. 97-217 the Commission identified ITFS as "a non-pay, *non-commercial broadcast service.*"^{17/}

Moreover, like Congress, the Commission has frequently applied rules and policies initially designed for the non-commercial educational broadcast service to ITFS. As the *Notice*

^{15/} In this regard, it is worth noting that the *Notice* mistakenly designates ITFS as a "point-to-point" service. See *Notice*, at ¶¶ 98, 100. In fact, it is a point-to-multipoint service that involves the transmission of the same programming to numerous television receivers simultaneously — just like broadcasting. See, e.g. *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees To Engage in Fixed Two-Way Transmissions*, FCC 97-360, MM Docket No. 97-217, at ¶ 16 (rel. Oct. 10, 1997)[hereinafter cited as "*ITFS/MDS Flexible Use NPRM*"]; *Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996 Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, 11 FCC Rcd 19276, 19294-25 (1996) *Establishment of a Spectrum Utilization Policy for the Fixed and Mobile Services Use of Certain Bands Between 947 MHz and 40 GHz*, 2 FCC Rcd 1050, 1069 (1987).

^{16/} *Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, FCC 97-420, at ¶ 283 (rel. Dec. 30, 1997)(emphasis added)[hereinafter cited as "*Universal Service Fourth Order on Reconsideration*"].

^{17/} See *Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, FCC 97-360, MM Docket No. 97-217, at B-2 (rel. Oct. 10, 1997)(emphasis added).

recognizes, "ITFS . . . has certain characteristics in common with the noncommercial educational and public broadcast services which are specifically exempted from our Section 309(j) auction authority."^{18/} Perhaps most importantly, licensees in the two services are generally drawn from a common pool of non-commercial entities. ITFS licenses can only be issued to "an accredited institution or . . . a governmental organization engaged in the formal education of enrolled students or . . . a nonprofit organization whose purposes are educational and include providing educational and instructional material to . . . accredited institutions and governmental organizations."^{19/} Similarly, noncommercial educational broadcast licenses are available to "nonprofit educational organizations" or, in some cases, municipalities that can demonstrate that the "proposed station will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television broadcast service." Although the specific language of the eligibility rules are somewhat different, in 1985 the Commission recognized that as a practical matter they were indistinguishable and eliminated as duplicative a provision specifically declaring that eligibles

^{18/} See *Notice*, at ¶ 100. As the Commission has recognized, like noncommercial educational broadcast stations, ITFS stations are intended for educational use and are exempt from application fees. See *id.* Moreover, as discussed in more detail herein, the eligibility requirements for the two services are virtually identical, both services are exempt from regulatory fees, and both services have been excused from contributing to the Universal Service Fund. Moreover, many of the Commission rules applicable to non-commercial broadcasters are also applicable to ITFS licensees. See 47 C.F.R. § 74.910 (making various Part 73 requirements applicable to ITFS licensees). See also *Hispanic Information & Telecommunications Network*, 7 FCC Rcd 5924, 5926 (1992)[hereinafter cited as "*HITN*"].

^{19/} See 47 C.F.R. § 74.932.

for noncommercial educational television broadcast stations are eligible to hold ITFS licensees.²⁰ Moreover, the uses to which ITFS stations and noncommercial broadcast television stations can be put are virtually identical.^{21/}

This similarity has led the Commission to apply similar rules and policies to the two services with respect to financial matters, implicitly recognizing that licensees in both services face similar financial hardships. Following Congress' lead (as noted above), the Commission exempts both ITFS and noncommercial educational broadcast stations from its application fee and regulatory fee requirements due to the similarities between the services.^{22/} Moreover, the

^{20/} See *Amendment of Part 74 of the Commission's Rules and Regulations In Regard To The Instructional Television Fixed Service*, 101 F.C.C.2d 50, 60 (1985)[hereinafter cited as "*ITFS Point System Order*"].

^{21/} Pursuant to Section 73.621(c) of the Commission's Rules:

Noncommercial educational television broadcast stations may transmit educational, cultural and entertainment programs, and programs designed for use by schools and school systems in connection with regular school courses, as well as routine and administrative material pertaining thereto.

47 C.F.R. § 73.621. ITFS stations, meanwhile are intended "to transmit formal educational programming offered for credit to enrolled students of accredited schools," for "transmitting other visual and aural educational, instructional and cultural materia . . . including in-service training and instruction in special skills and safety programs, extension of professional training, informing persons and groups engaged in professional and technical activities of current developments in their particular fields, and other similar endeavors," and "for the transmission of material directly related to the administrative activities of the licensee." 47 C.F.R. § 74.931.

^{22/} See *supra* at 6. See also *HITN*, 7 FCC Rcd at 5926 ("it should be noted that the similarities between the ITFS instructional service and the noncommercial educational broadcast service prompted the Commission to treat ITFS applicants, permittees, and licensees in the same manner as their noncommercial educational broadcast counterparts, exempting them from the schedule of charges applied under the Commission's fee collection program.").

Commission has recognized that in light of the similarities of the two services, ITFS licensees should be entitled to the same exemption from application fees for otherwise feeable interconnection facilities as was granted noncommercial educational broadcasters.^{23/} The Commission also has imposed the same financial qualification requirements on noncommercial broadcast and ITFS applicants.^{24/} The Commission has explained this treatment as follows:

The application of broadcast service rules and policies to ITFS . . . is not premised on ITFS applicants providing broadcast-like services; rather, it is premised on the directly analogous nature of the funding sources and procedures which face the shared educational purposes of both services.^{25/}

Given that Congress and the Commission have consistently treated ITFS and non-commercial broadcast stations identically with respect to payments to the Federal Government and other financial matters in connection with their authorizations, and that there is absolutely no evidence Congress intended to take a different tack here, the Commission should find that mutually-exclusive applicants for initial ITFS authorizations are exempt from competitive bidding.

B. The Commission Should Refrain From Employing Competitive Bidding To Select From Among Mutually-Exclusive Applications For New ITFS Stations.

The use of competitive bidding to select from among mutually-exclusive applicants for

^{23/} See *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 3 FCC Rcd 5987, 5989 (1988).

^{24/} See *HITN*, 7 FCC Rcd at 5926 (1992).

^{25/} *Id.*

authorizations for new ITFS stations is not only not required by the Balanced Budget Act, it would be inappropriate given the unique nature of the ITFS.

WCA does not dispute that under appropriate circumstances, awarding licenses to those who value them the most (as evidenced by their willingness to bid the most at auction) “will likely encourage growth and competition for wireless services and result in the rapid deployment of new technologies and services.”^{26/} However, the same logic does not follow when it comes to the awarding of specialized licenses to non-commercial entities for the purpose of providing educational and instructional telecommunications services.

For more than a decade, the Commission has employed a point system to select from among mutually-exclusive applicants for new ITFS facilities. Under that system, points are awarded as follows:

- four points for applicants that are “local”;
- three points for accredited schools (or their governing bodies) applying within their jurisdiction;
- two points for seeking licenses for no more than four channels within a locality;
- one or two points depending upon the quantity of educational programming the applicant anticipates transmitting; and
- one point for a grandfathered ITFS licensee migrating off of spectrum subsequently allocated to the Multipoint Distribution Service.^{27/}

In adopting this point system, the Commission took special note of “the nature and importance of the valuable educational objectives of ITFS and the significant differences

^{26/} *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2349-50.

^{27/} *See* 47 C.F.R. §74.913(b).

between applicants in the ITFS service.”^{28/} Thus, the Commission sought to develop a relatively uncomplicated system that would permit the identification of the applicant most likely to provide the service that best meets the educational and instructional needs of the community in issue. In so doing, the Commission recognized that:

The use of any point system involves subjective judgement, but the criteria used in making selections among ITFS applicants must be calculated to grant licenses to those applicants that are most likely to best meet the educational and instructional needs of the various communities. The specific weight assessed to each characteristic will represent the relative significance deemed, in the Commission’s best judgment, appropriate to those factors.^{29/}

By and large, WCA believes that the point system has been an extremely effective and cost-efficient tool in awarding licenses to the applicant most likely to serve the educational and instructional needs of the community. Although miscarriages of justice are an inherent risk whenever one attempts to develop a mechanical system as a proxy for subjective evaluation, the ITFS comparative point system has to date not yielded any grossly inappropriate results.

Conversion to an auction system, however, is unlikely to achieve the same record of success. The willingness to pay the most money for a license (particularly one that allows the leasing of excess capacity) is not necessarily an assurance that the high bidder is the most likely applicant to provide the educational and instructional services most needed by the community in question. For example, the Commission’s point system today assures that a local accredited school board applying for its first ITFS license will prevail over a national ITFS filer with only

^{28/} *ITFS Point System Order*, 101 F.C.C.2d at 68.

^{29/} *Id.* at 69.

minimal contacts within the community. This reflects the Commission's long-standing view that:

Locally based educational entities have been convincingly demonstrated by the commentators to be the best authorities for evaluating their educational needs and the needs of others they propose to serve in their communities, for designing courses to suit those needs, and for scheduling courses during the school year. They best understand the educational needs and academic standards of their communities and are the most appropriate bodies to produce educational programming or select such programming from the sources available. Thus, they can act most responsibly in designing and developing ITFS systems. Locally based curriculum development, instructor involvement, supplementary (print) material development, student feed-back, and assistance to participating students all provide critical contributions to the most effective use of instruction via television.^{30/}

Even if the Commission adopts WCA's proposal to provide enhanced bidding credits to local accredited educators (*see infra* at Section II.D.4), there can be no assurance that the accredited local school will be able to outbid a national filer. Indeed, in this age of tight school budgets, it is certainly conceivable that many local school boards will refrain from even entering into a spectrum auction, given the uncertainties inherent in the process. Thus, the Commission should recognize that the use of auctions to award ITFS authorizations will sound the death knell for the Commission's strong preference for localism.

Finally, to require educators to obtain ITFS licenses at auction would run contrary to the philosophy underlying the Commission's recent decision to exempt non-profit schools, colleges, universities, libraries and health care providers from Universal Service Fund contribution

^{30/} *ITFS Point System Order*, 101 F.C.C.2d, at 56.

requirements.^{31/} Just as the Commission there recognized that it would be inappropriate to require contributions to the Universal Service Fund from the very organizations that the Commission was attempting to benefit, it would be passing strange for the Commission to require ITFS licensees to pay to secure authorizations at the very same time the Commission is proposing to make a variety of regulatory changes designed to promote financial contributions from the wireless cable industry to ITFS.^{32/}

C. The Commission Should Exempt Mutually Exclusive Applications For New ITFS Stations Pending Since October 1995 Or Earlier From Competitive Bidding, And Should Process Those Applications Under The Current Point System Process.

The *Notice* solicits public comment on whether the Commission should employ competitive bidding to select from among currently pending mutually-exclusive applications for new ITFS stations.^{33/} As WCA discussed above, the use of auctions to select from among mutually-exclusive applicants for new ITFS stations (whether on file or filed in the future) is contrary to the public interest. Indeed, for the reasons set forth below, it would be particularly inappropriate to change from the current point system for the long-pending mutually-exclusive applications for new ITFS stations.

The last time the Commission accepted applications for new ITFS facilities was in October 1995. Despite the passage of more than two years, more than one-half of the

^{31/} See *Universal Service Fourth Order on Reconsideration*, at ¶ 284.

^{32/} See *ITFS/MDS Flexible Use NPRM*.

^{33/} See *Notice*, at ¶ 100.

applications filed during that window (which also include major modification application) remain pending, including a substantial number of mutually-exclusive applications for new ITFS stations. Although those applications have yet to be formally subjected to the Commission's comparative point system, the applicants have built up certain reasonable expectations regarding the outcome of those comparative selection proceedings, as they are relatively easy to handicap because of the simplicity of the comparative selection point system. Those expectations should not be disturbed.

For example, in many cases the mutually-exclusive applications involve a local accredited school seeking its first ITFS authorization on one side, with a national ITFS filer on the other. Under the current point system, the local accredited school is assured of winning, and may well have made extensive plans and expended significant funds on the reasonable assumption that it will be able to incorporate ITFS programming into its curriculum.

Under similar circumstances where the Commission has switched to the use of auctions to award licenses for an existing service, the Commission has chosen to process pending applications under the rules in existence when the applications were filed. This was the case, for example, when the Commission promulgated competitive bidding rules for pending cellular unserved area and MDS applications.^{34/} In the *MDS Auction Order*, the Commission noted that

^{34/} See *Implementation of Section 309(j) of the Communications Act Competitive Bidding*, 9 FCC Rcd 7387 (1994) (disposition of cellular unserved area applications); *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service; Implementation of Section 309(j) of the Communications Act*, 10 FCC Rcd 9589, 9630 (1995) (adopting auction rules for MDS) [hereinafter cited as "*MDS Auction Order*"].

those application had already incurred substantial delays — all had been filed nearly two years prior to the adoption of MDS auction rules.^{35/} The Commission also noted that additional costs to applicants (who would be require to submit information required by the competitive bidding rules) and administrative costs to the Commission did not justify the use of auctions in those cases. Similarly, in 1994, the Commission decided not to subject to auctions applications for cellular unserved areas that had been filed before July 26, 1993 because many of those applications had been on file for over one year, the applicants' business plans did not take into account additional expenditures that would be incurred in the event of auctions and the spectrum at issue was considered to have questionable commercial value.^{36/} Equitable considerations in favor of ITFS applicants are even stronger. As explained above, the several hundred ITFS applications at issue have been pending for over two years.

Of course, where there have been situations in which the Commission has chosen to dismiss pending applications and require that they be re-filed under the auction system, those involved cases where lotteries were to be employed to resolve mutual-exclusivity or other factors existed that made it impossible for applicants to reasonably predict outcomes.^{37/} Thus, the

^{35/} See *id.*, at 9630-31.

^{36/} *Implementation of Section 309(j) of The Communications Act -- Competitive Bidding*, 9 FCC Rcd 7387, 7391-92 (1994).

^{37/} See, e.g., *Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, 12 FCC Rcd 10,943, 11,038-40 (1997); *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands; Implementation of Section 309(j) of the Communications Act — Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz*, ET Docket No. 95-183, PP Docket No. 93-253, FCC 97-391, ¶ 6 (rel. Nov. 3, 1997).

situation here is readily distinguishable, as here the pending applicants could readily determine which would prevail under the point system and could reasonably act in reliance on that determination. Similarly, the situation here can be distinguished from the vast majority of pending broadcast applications addressed in the *Notice*, since these broadcast applications were filled at a time when no comparative criteria existed and thus no applicant could have reasonably anticipated prevailing.^{38/} And, of course, since the point system can be quickly applied, the use of auctions for ITFS will not expedite service in the manner that broadcast auctions will.^{39/}

The *Notice* suggests that the Commission is considering using auctions to select from among long-pending mutually-exclusive applicants in a variety of services not specifically addressed in Section 309(l), including ITFS, because the Balanced Budget Act terminated the Commission's lottery authority.^{40/} However, the Commission's rationale for employing auctions in those other services, does not apply in the case of ITFS. Unlike those other services, mutually

^{38/} See *Notice*, at ¶ 15. Thus, the situation here is unlike those involved in the cases of *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987) and *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997) cited in the *Notice* as authority for applying auctions to pending broadcast applications. In *Maxcell Telecom*, the use of lottery procedures on an application filed when the rules called for comparative hearings was upheld because, *inter alia*, the applicant was aware that the Commission was contemplating the use of lotteries. 815 F.2d at 1555. Similarly, in *Chadmoore Communications*, the Court affirmed the denial of an application due to a rule change subsequent to the filing of the application noting, among other things, that the applicant was on notice of the potential for change and could not reasonably rely on retention of the existing rules. 113 F.3d at 241. Here, however, there was no indication prior to the adoption of the Balanced Budget Act that the Commission would deviate from its point system for selecting from among mutually-exclusive applications for new ITFS stations.

^{39/} See *Notice*, at ¶¶ 17-18.

^{40/} See *id.* at ¶ 40.

exclusive ITFS applications are not awarded through lotteries, but through a comparative selection point system that is unique to ITFS.^{41/} Thus, the elimination of lottery authority does not deprive the Commission of its existing mechanism for selection from among competing applicants for new ITFS authorizations.^{42/}

D. In The Event That The Commission Adopts Competitive Bidding Rules For ITFS Applications, Service-Specific Rules Must Be Used To Preserve The Educational Goals Of The Service.

1. *The Balanced Budget Act Dictates That The Commission Not Employ Geographic Licensing Schemes That Would Artificially Create Mutual Exclusivity.*

Although the *Notice* is not entirely clear, it appears that the Commission is proposing to retain its current approach to determining whether two or more applications for new ITFS stations are mutually-exclusive, *i.e.* by examining whether the proposed facilities are predicted to cause actual harmful interference to another.^{43/} WCA applauds that approach.

Retention of the current engineering-based method of assessing mutual exclusivity for ITFS is consistent with the requirements of Section 309(j). When it expanded the Commission's

^{41/} See 47 C.F.R. § 74.913.

^{42/} If the Commission does employ auction with respect to pending ITFS applications, it should honor the fact that those applications were cut off from competing applications at the close of the October 1995 filing window, and should not permit new applicants to participate in any auction. Moreover, such auctions should be conducted in accordance with the policies proposed in Paragraphs 43 through 45 of the *Notice*.

^{43/} See *Notice*, at ¶¶ 46, 58, 61. If the Commission employs competitive bidding to select from among mutually-exclusive applications, and retains the current procedures for identifying mutually-exclusive applications, the staff will require the filing of all of the technical information specified in the current application form — FCC Form 330 — in order to make determinations of mutual-exclusivity at the time of filing the “short form.” See *Notice*, at ¶ 62.

auction authority with the Balanced Budget Act, Congress took pains to predicate that authority with a reference to the statutory rules on competitive bidding that are found in Section 309(j)(6) of the Communications Act. Specifically the Commission's statutory auction authority reads:

GENERAL AUTHORITY — If, *consistent with the obligations described in paragraph (6)(E)*, mutually exclusive application are accepted for any initial license or construction permit, then ... the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.^{44/}

Paragraph (6)(E) mandates:

Nothing in this subsection, or in the use of competitive bidding, shall be construed to relieve the Commission of the obligation in the public interest to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.^{45/}

Moreover, the Conference Report accompanying the Balanced Budget Act emphasized that:

the conferees emphasize that, notwithstanding its expanded auction authority, the Commission must still ensure that its determinations regarding mutual exclusivity are consistent with the Commission's obligations under section 309(j)(6)(E). The conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.^{46/}

In contrast to the use of geographic licensing areas, continued application of the current site-

^{44/} 47 U.S.C. § 309(j)(A)(1); Balanced Budget Act, at § 3002(a) (emphasis supplied).

^{45/} 47 U.S.C. § 309(j)(6)(E).

^{46/} See H.R. Rep. No. 105-217, 105th Cong., 1st Sess. (1997)(Conference Report) at 572.

specific, interference-based approach to determining mutual-exclusivity among applications for new ITFS stations applications will minimize the number of mutually exclusive applications. Moreover, while a geographical licensing scheme based on commercial area designations, such as Basic Trading Areas (“BTAs”), may be appropriate for the licensing of commercial services, such geographic service areas often are far larger than the local services areas that most educational institutions desire to serve through ITFS.

While the Commission has noted that the relatively large geographic area encompassed by a BTA is generally sufficiently large “to allow applicants flexibility in designing a system to maximize population coverage and take advantage of economies of scale necessary to support a successful operation,”^{47/} no such commercial considerations obtain here. To the contrary, it would run counter to the Commission’s long-held preference for local ITFS licensees to license facilities based on geographic service areas that bear logical relationships to the local service areas most ITFS licensees attempt to reach (and in most cases would be far larger than the area in which the licensee is considered to be a local entity).^{48/} The Commission has previously indicated that “[w]e seek to provide as many educators as possible with the opportunity to operate ITFS systems that meet their educational needs,” a goal that is hardly achieved by licensing service areas far larger than necessary.^{49/}

^{47/} *MDS Auction Order*, at 966.

^{48/} *ITFS Point System Order*, 101 F.C.C.2d, at 56.

^{49/} *Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, 10 FCC Rcd 2907, 2914 (1995).

In short, retention of the current site-specific, interference based approach to determining mutual exclusivity will not only minimize mutual-exclusivity, it will also maintain the local focus of ITFS.

2. *If Auctions Are Employed For ITFS, A Sequential Open Outcry Bidding Methodology Should Be Employed.*

In the event that the Commission chooses to employ competitive bidding to award ITFS licenses, a sequential open outcry bidding format with remote bidding should be employed in order to provide the most rapid and efficient licensing of new facilities.

In the *Competitive Bidding Second Report and Order* the Commission noted:

We intend to tailor the auction design to fit the characteristics of the licenses that are to be awarded. Given the diverse characteristics of the various services that may be subject to auctions, simultaneous multiple round auctions may not be appropriate for all licenses. The less the interdependence among licenses, the less the benefit to auctioning them simultaneously. Because simultaneous auctions are more costly and complex to run, we may choose a sequential auction design when there is little interdependence among individual licenses or groups of licenses. Such a design may include sequential oral auctions of individual licenses and a sequence of simultaneous auctions of multiple licenses.^{50/}

As the Commission considers utilizing auctions to award new ITFS authorizations, it must recognize that licenses have been issued for virtually all ITFS channels in every market of any size. As a result, the Commission will be auctioning the “table scraps.” Consistent with the language quoted above, the Commission has noted that “[t]he two primary characteristics that will determine our choice of auction design are: (1) the degree to which licenses are

^{50/} See *ITFS Point System Order*, 101 FCC 2d at 53-63.

interdependent, and (2) the expected value of the licenses being auctioned.”^{51/} Both of these factors suggest that a sequential bidding approach is most appropriate for ITFS.

Because of the educational programming emphasis of ITFS and the non-commercial nature of the ITFS applicant pool, it is unlikely that ITFS authorizations will have significant value at auction. Moreover, there is virtually no interdependency. As the Commission explained in the *Competitive Bidding Second Report and Order*:

Licenses may be interdependent either because they are substitutes or because they are complements. With substitutes, the lower the price of one license, the less a bidder would be willing to pay for another. Perfect substitutes are highly interdependent because the price of one puts an absolute cap on the amount a bidder is willing to pay for the other. If, for example, licenses A and B are perfect substitutes and a bidder knew that license A could be purchased for \$100, that bidder would be willing to pay no more than \$100 for license B.^{52/}

Thus, the Commission has employed simultaneous multiround auctions in many commercial services because it recognizes that a bidder for, say a PCS license in New York would likely move its bidding to some other market rather than cease bidding entirely if the bidding for New York authorizations exceeded the bidders estimation of value.

By contrast, ITFS licenses have no interdependent characteristics. Applicants for new ITFS facilities are seeking authorizations for facilities that have been designed to meet particular local educational needs. Quite simply, when a local school district applies for a new ITFS a station in rural Virginia, it will not place any value on a license in St. Louis and will not shift its

^{51/} See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2367.

^{52/} *Id.* at 2364.